

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Douglas A. Kelley, in his	)	File No. 19-cv-1756
capacity as the Trustee of the	)	(WMW)
BMO Litigation Trust,	)	
	)	
Plaintiff,	)	St. Paul, Minnesota
	)	November 7, 2022
vs.	)	10:22 a.m.
	)	
BMO Harris Bank N.A., as	)	
successor to M&I Marshall and	)	
Ilsley Bank,	)	
	)	
Defendant.	)	

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BEFORE THE HONORABLE WILHELMINA M. WRIGHT  
UNITED STATES DISTRICT COURT JUDGE  
  
**(JURY TRIAL PROCEEDINGS - VOLUME XVI)**

Proceedings reported by certified court reporter;  
transcript produced with computer.

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I N D E XPAGE

JURY QUESTIONS

3811

**P R O C E E D I N G S**

**IN OPEN COURT**

**(JURY NOT PRESENT)**

THE COURT: So we are here in open court outside the presence of the jury because we have -- and this is Kelley vs. BMO Harris Bank, 19-cv-1756. The jury has provided a question to the Court, and I will read that now. Do we have the question? It is just -- the jury asked three questions:

"1. Jury Instruction Number 20. Does this imply that actions before November 15th, 2006 should not be considered in our deliberations?

The second question was regarding Jury Instruction Number 21. "In layman's terms, how does this apply to the charges? Does this mean that PCI knowingly acted the way they did and agrees to the actions?"

And the third question pertains to Jury Instructions 14 and 15, and that is: "Does the Court know if bank accounts were set up for Special Interest groups?"

The answer that I propose to give is:

"As provided in the Court's jury instructions, your duty is to decide what the facts are from the evidence. The jury instructions, including but not limited to Jury Instruction 3, describe what is evidence and what is not evidence.

1 "After you have decided what the facts are, you  
2 must apply those facts to the law, which has been provided  
3 to you in the Court's jury instructions. These instructions  
4 include, but are not limited to, Jury Instruction 20 and  
5 Jury Instruction 21.

6 "You must follow all the Court's instructions no  
7 matter when the Court gave them. Do not single out some  
8 instructions and ignore others, because they are all  
9 important."

10 Do the parties wish to be heard as to the response  
11 that I intend to give?

12 MR. MARDER: The plaintiff would like to be heard,  
13 Your Honor.

14 THE COURT: Yes, you may.

15 MR. MARDER: Your Honor, taking these one at a  
16 time, first with Instruction Number 20, we think that the  
17 answer to that question should be "No."

18 It's very clear under the law that a cause of  
19 action accrues when all elements of the claim come into  
20 existence, including damages. So it is very clear that  
21 conduct before November 15th, 2006 is considered in the  
22 deliberations. That conduct -- the underlying conduct could  
23 certainly prove knowledge even if it was before  
24 November 15th, 2006.

25 So we think that -- the answer to that question

1       should be "No."

2               With respect to Question [sic] Number 21, the jury  
3       appears to be a bit confused about the concept of knowledge.  
4       You had included in your instructions the notion that the  
5       people who were acting to defraud the company, that their  
6       knowledge could not be considered.

7               So in response to Number 21, it is the plaintiff's  
8       position that it should be drawn to the jury's attention  
9       that they should not take into account the conduct of the  
10      individuals who are acting fraudulently.

11              As opposed to -- with regard to the third  
12      question, Jury Instruction Number 14 and 15, I think on that  
13      one we think that the jury should just be referred to the  
14      evidence and to apply it as they remember it.

15              But as to the first two, Your Honor, we think it's  
16      very important that the jury be instructed on Number 20 that  
17      they can take into account conduct that happened before  
18      November 15th, 2006 because it's black-letter law that that  
19      conduct is relevant as long as damages did not accrue until  
20      after that date.

21              And with respect to 21, I really think they need  
22      to be -- it needs to be brought home to them that they can't  
23      take into account the knowledge of, quote, PCI, but rather  
24      the knowledge of the people at PCI that were not acting  
25      fraudulently.

1 THE COURT: Thank you, Counsel.

2 MR. SCHAPER: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. SCHAPER: Michael Schaper for BMO Harris Bank.

5 On the first two questions, defendant agrees with  
6 the Court's proposed answer. We think that the jury  
7 instructions at issue are clear and were put together after  
8 careful briefing and argument by both sides, and we think  
9 that they provide the information the jury needs there.

10 On question number 3 as to Jury Instructions 14  
11 and 15, defendant actually would suggest trying to get  
12 clarification from the jury about what they're asking about  
13 when they refer to "special interest groups."

14 It's not a term that is in Instructions Number 14  
15 or 15 and it was not a term that was used throughout the  
16 trial. So it's, to us, just not clear what that question  
17 relates to, and so we would respectfully suggest that we try  
18 to get some clarity as to what the jurors have in mind with  
19 that question.

20 THE COURT: Anything further as to this matter?

21 MR. MARDER: Not from the plaintiff, Your Honor.

22 THE COURT: Okay. I appreciate the positions of  
23 the parties and am not swayed to do anything other than what  
24 I proposed to do, which is to direct the jury through this  
25 answer:

1 "As provided in the Court's jury instructions,  
2 your duty is to decide what the facts are from the evidence.  
3 The jury instructions, including but not limited to Jury  
4 Instruction 3, describe what is evidence and what is not  
5 evidence.

6 "After you have decided what the facts are, you  
7 must apply those facts to the law, which has been provided  
8 to you in the Court's jury instructions. These instructions  
9 include, but are not limited to, Jury Instruction 20 and  
10 Jury Instruction 21.

11 "You must follow all of the Court's instructions,  
12 no matter when the Court gave them. Do not single out some  
13 instructions and ignore others, because they all are  
14 important."

15 So that is what will -- the answer that the Court  
16 will provide to these questions.

17 Is there anything else that needs to be brought to  
18 the Court's attention?

19 MR. MARDER: No, Your Honor.

20 MR. SCHAPER: No, Your Honor.

21 THE COURT: Okay. Very well. We are in recess.

22 (Recess taken at 10:29 a.m.)

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2  
3 I, Lori A. Simpson, certify that the foregoing is a  
4 correct transcript from the record of proceedings in the  
above-entitled matter.

5 Certified by: s/ Lori A. Simpson

6 Lori A. Simpson, RMR-CRR  
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